

BOARD OF APPEALS CASE NO. 114

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BEFORE THE

APPLICANT: BLC Properties, Inc.

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ZONING HEARING EXAMINER

REQUEST: Rezone 175.477 acres from R3,
Urban Residential, to CI, Commercial Industrial;
Old Philadelphia Road, east of Stepney, Aberdeen

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OF HARFORD COUNTY

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Hearing Advertised

HEARING DATE: April 4, 2001

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Aegis: 12/27/00 & 1/3/01

Record: 12/29/00 & 1/5/01

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ZONING HEARING EXAMINER'S DECISION

The Applicant, BLC Properties, Inc., is requesting a zoning reclassification of 175.477 acres from its current R3 classification to CI/Commercial Industrial and alleges that a mistake was made during the 1997 comprehensive rezoning process in maintaining the R3 classification of this property.

The subject parcel consists of 175.477±acres adjoining the Riverside Industrial Park on the south side of Philadelphia Road (Route 7) west of Stepney Road at Grays Run. The property is currently zoned R3/Urban Residential. The property is more particularly identified among the land records of Harford County on Tax map 62, Grid 1F, Parcel 60 and is entirely within the First Election District.

FINDINGS OF FACT

The property has an extensive zoning history which is important in understanding the current request.

1957 Comprehensive Zoning Review: In 1957 this parcel was zoned M2/heavy manufacturing, a classification comparable to today's GI/ General Industrial zone.

1976 Case I-75-#16: In 1976, at the request of the property owners, the parcel was rezoned from M2/Heavy Manufacturing to R3/Urban Residential.

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1982 Comprehensive Rezoning: In 1982 the part of the business park then zoned M2/Heavy Manufacturing was given the new classification of GI/General Industrial. The subject parcel remained R3/Urban Residential.

1989 Comprehensive Rezoning: During the 1989 comprehensive rezoning process and at the request of the property owner (the Applicant herein) the property was rezoned by the Harford County Council to a combination of CI/Commercial Industrial and GI/General Industrial. No R3 zone remained on this property after the 1989 comprehensive rezoning.

1995 Board of Appeals Case 063: The County Council, sitting as the Board of Appeals approved a piecemeal rezoning of the property to R3/Urban Residential. The Applicant argued successfully that a mistake occurred when the property was rezoned from R3 to CI and GI during the 1989 comprehensive rezoning process. The basis of the Applicant's mistake argument was the delineation of large areas of non-tidal wetlands reducing lot sizes below market requirements and a change in the market trend away from "small box" lots which was unforeseen in 1989. Coupled with the mistake argument, the Applicant successfully convinced the hearing Examiner and the Board that the property was suitable for residential uses and submitted a plan for development of 365 residential units which actually went to final plat approval. The Department of Planning and Zoning opposed the piecemeal rezoning requested by the Applicant in case 063, but a review of the Hearing Examiner's decision in that case indicates that the then Chief of Current Planning for the Department testified during the taking of testimony that the Department generally opposed piecemeal rezoning and that if the request to rezone this parcel to R3 were part of a comprehensive review, the Department would likely support such a reclassification. Thus, in 1995, everyone who reviewed this property agreed that a mistake was made in 1989 in rezoning the property from R3 to CI/GI.

1997 Comprehensive Rezoning: The property was not an issue in 1997 and maintained its R3 zoning classification.

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The facts of the case are rather simple. Aside from the zoning history above there were, apparently, covenants on the property that prevented any residential use of the subject parcel. The Applicant's witnesses testified that the Applicant believed these covenants had been invalidated by a subsequent Second Amendment to the Declaration of Covenants and consequently led the Applicant to conclude that this Declaration released the property from earlier covenants restricting any residential use. These covenants were not brought to the attention of the County Council in 1989 or 1997 and were not part of the record before the Hearing Examiner in 1995 when Board of Appeals Case 063 was heard and decided. Despite the belief of the Applicant, McCormick & Company, Inc. filed suit in May, 1997, objecting to the deannexation of the Applicant's property from the 1981 industrial use covenants. The Honorable Judge Cypert Whitfill entered his decision in this matter on June 25, 1999 (Case No, 28686, Circuit Court for Harford County). In his decision Judge Whitfill found that the Second Amendment to the Declaration of Covenants, which purportedly released the property from the earlier industrial use covenants was " ...invalid, null and void." Judge Whitfill stated in his Order:

- "(3) That the use of the Adjacent Property for residential use constitutes a violation of the Declaration (as amended by the First Amendment);
- (4) The Court hereby enjoins BLC Properties, Inc. And JMR Development Company, Inc. And all these acting in concert with them or on their behalf, from developing, marketing or selling and/or using all or any part of the Adjacent Property for residential purposes."

Gregory Szoka, Esquire, counsel for the Applicant during the case with McCormick, indicated that the case was appealed to the Maryland Court of Special Appeals, however, the Applicant and McCormick entered into an agreement which effectively ended the case. As part of the Agreement, which Mr. Szoka stated resulted directly from the litigation, BLC gave up its rights to appeal Judge Whitfill's decision in return for McCormick's support of a rezoning request to return the property to a CI classification. Mr. Szoka noted McCormick's letter in this case (Applicant's Ex. 6) commending approval of a zoning reclassification to CI.

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Mr. Szoka testified that nobody, prior to the conclusion of the litigation with McCormick, believed that development of this property for residential uses was in any way restricted. In the opinion of the witness, neither the Hearing Examiner nor the Board of Appeals would have approved a rezoning request to R3 had it been known at that time that residential uses were prohibited on this property by covenants attaching to the land. Those facts did not come to the attention of the Department of Planning and Zoning or the Harford County Council in 1997 and were not, therefore, considered by either body during the 1997 comprehensive rezoning process.

The question of wetland delineation was also discussed by Mr. James Keefer who was admitted as an expert Landscape Architect and Engineer. According to the witness, the standards for wetland delineation changed during the period 1989 to present and the result is that there are fewer wetland areas on the property than previously believed, thus allowing larger lot development for what were described as “big box” uses. Because the new delineation results in 10 additional acres of developable land, greater flexibility of lot design is achieved and makes the property most suitable for commercial uses.

Mr. Timothy Madden was accepted as an expert Land Planner and Landscape Architect. Mr. Madden testified that the property is very suitable for commercial use based on the new wetland configuration and resulting lot design flexibility permitted. The property is within the Riverside Industrial Park and is adjacent to other industrial/commercial uses. In his opinion, granting a reclassification of this property to C1 was compatible with other existing uses in the neighborhood which include Clorox, Super Value, McCormick and Crown Cork & Seal. Mr. Madden concluded by stating that neither the Hearing Examiner nor the Board of Appeals could have known in 1995 or 1997 that a new wetlands delineation would make this property suitable for commercial uses nor could anyone have known that the Court would enjoin future residential development. In the opinion of the witness, these subsequent facts justify a finding of mistake and a conclusion that rezoning of the property is warranted.

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Mr. Philip Tolliver testified as an expert Civil Engineer. Mr. Tolliver testified that there are adequate points of ingress and egress to the site along Route 7. There is a sixteen (16) inch watermain that can adequately serve the proposed commercial uses. The new wetlands configuration allows for adequate “big box” construction with the attendant parking and loading dock requirements. Mr. Tolliver stated that this property is very suitable for commercial use and that prior to 1999, nobody was aware that the parcel could not be residentially developed. In fact, the Applicant spent a great deal of financial resources obtaining record plat approval for a significant residential development on this property.

Last to testify for the Applicant was the principal of the contract purchaser (Preston Partners, Inc,) Mr. David Scheffenacker. The witness stated that his company just completed the construction of a 350,000 square foot warehouse in Aberdeen and previously developed the Clorox facility in Riverside. The witness testified that it was his business to know what sites were compatible for commercial and industrial uses and that, in his opinion, the subject property was desirable commercial land. Additionally, the witness pointed out the proximity and easy access to Route 7 and I-95 as well as the commercial success of the Riverside Industrial park.

Mr. Anthony McClune testified on behalf of the Department of Planning and Zoning and indicated that the Department agreed that a mistake was made both in 1995 and 1997 when this property was rezoned to R3. In addition, the Department now agrees that CI zoning is appropriate for this parcel due to its proximity to Riverside Industrial Park, its access to road and utility infrastructure, its conformance with the Master Plan and the latest delineation of wetlands which invalidates the wetland study done in 1990 and relied upon by the Hearing Examiner and Board of Appeals in Case 063 decided in 1995.

No protestants appeared and offered testimony opposing the requested rezoning although People’s Counsel appeared and submitted a brief in opposition to the request.

CONCLUSION:

The Applicant claims that a “mistake” was made during the 1997 Comprehensive Rezoning process because certain facts were unknown to the Council in 1997 which first became known in 1999 and which have direct impact on the uses permitted on the subject property.

In Maryland, there is a strong presumption of correctness of original and comprehensive rezoning. To sustain a piecemeal change in zoning, strong evidence of mistake in the original zoning or comprehensive rezoning...must be produced. Stratakis v. Beauchamp, 268 Md. 643, 304 A 2d. 244 (1973). The basic principles of what has become known as the “change-mistake” rule in Maryland was set forth by the Maryland Court of Special Appeals as follows:

“It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of adoption of the map, the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. This, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council... Because facts occurring subsequent to comprehensive zoning were not in existence at the time, and therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into account by the Council at the time of comprehensive zoning.” Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975).

The Maryland Court of Appeals has provided further guidance in approaches to determine a mistake in zoning sufficient to justify a piecemeal rezoning.

1. Evidence showing that the initial premises of the Council with respect to the subject property were incorrect and consequently, the classification assigned at the time of the comprehensive zoning was improper. This may involve demonstrating the Council’s unawareness of readily visible physical characteristics and location of the property and failing to take such into account, or,
2. Evidence of any events occurring subsequent to the time of the comprehensive zoning which would show that the Council’s assumptions and premises proved invalid with the passage of time. Howard County v. Dorsey, 292 Md. 351, 438 A.2d 1339 (1982).

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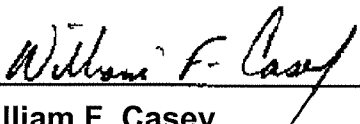
In the instant case, two sets of facts were unknown to the Hearing Examiner and Board of Appeals in 1995. First, neither the Hearing Examiner nor the Board of Appeals knew or could have known that there existed covenants prohibiting development of this parcel for residential use. Indeed, the Applicant was unaware of this and proceeded through the costly and time consuming process of recording a final residential development plat. Neither the Board of Appeals nor the hearing Examiner could have known in 1995 that the standards for delineation of wetlands would be changed and negate the very premise upon which piecemeal rezoning was granted in Case 063. Both of these sets of factual circumstances were unchallenged and unexamined by the Council during the 1997 comprehensive rezoning process. These subsequent facts change the premises and assumptions upon which the hearing Examiner and the Board relied in 1995 when it rezoned this property from CI/GI to R3. These same erroneous assumptions and premises were perpetuated by the Council in 1997 during the comprehensive rezoning process and constitute a mistake justifying the Council's ability to now rezone the property.

But the ability to rezone the property because a mistake is found is only one-half of the equation. Secondly, the question of should this parcel be rezoned must be addressed. The finding of mistake merely justifies consideration of rezoning, but does not mandate rezoning. Steel v. Cape Corp., 110 Md. App. 406, 677 A. 2d 634 (1996). The Hearing Examiner is satisfied, however, that it is appropriate to rezone this property as CI. This conclusion is supported by the unrebutted testimony of each witness that appeared before the hearing Examiner. This parcel adjoins the Riverside Industrial park; commercial uses proposed and contemplated on the subject parcel are compatible with existing commercial and industrial uses, there is sufficient water supply; there is sufficient points of ingress and egress to Route 7; the lot sizes may be configured in a manner allowing "big box" uses and still maintain adequate parking and loading dock facilities; this zoning is consistent with the master Land Use Plan; the contemplated uses are compatible with other existing uses in the neighborhood; residential use is prohibited and barred in perpetuity on this property by virtue of the Circuit Court's ruling on restrictive covenants attaching to this property.

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For all of the above reasons, the Hearing Examiner finds that there was a mistake made in rezoning this property to R3 in 1995 which mistake was not corrected in 1997 during the comprehensive rezoning process. Further, the Hearing Examiner recommends that the parcel be rezoned to C1.

Date SEPTEMBER 12, 2001



William F. Casey
Zoning Hearing Examiner